Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOE BALLARD,

Petitioner,

vs.

AIRPORT COMMISSION; CITY OF NEWPORT, ARKANSAS; WAYNE BEARD, JR., MAYOR; WILEY ALLBRIGHT, JR., CHAIRMAN; TERRY DILLON, COMMISSIONER; RALPH FORD SINK, COMMISSIONER; KENNETH THAXTON, JR., COMMISSIONER; and BURTON FORD, COMMISSIONER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court clearly erred, following a bench trial, the district court found that, while petitioner, Joe Ballard, had established a prima facie case of age discrimination, defendants had advanced unrebutted legitimate, non-discriminatory reasons for Ballard's termination, namely, Ballard's failure to adequately perform his job as airport manager.

PARTIES TO THE PROCEEDING

Petitioner, Joe Ballard, is a resident of Greenbriar, Arkansas. He was the plaintiff in the lower court proceedings of this case and was the appellant before the United States Court of Appeals for the Eighth Circuit.

Respondent, Airport Commission, is a governing body of individuals which receives its authority directly from the City of Newport, Arkansas.

Respondent, Wayne Beard, Jr., was the mayor for the City of Newport, Arkansas.

Respondent, Wiley Allbright, Jr., was the chairman of the Newport Airport Commission.

Respondents, Terry Dillon, Ralph Ford Sink, Kenneth Thaxton, Jr., and Burton Ford, were commissioners for the Newport Airport Commission.

There are no other parties to this action.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOE BALLARD,

Petitioner,

vs.

AIRPORT COMMISSION; CITY OF NEWPORT, ARKANSAS; WAYNE BEARD, JR., MAYOR; WILEY ALLBRIGHT, JR., CHAIRMAN; TERRY DILLON, COMMISSIONER; RALPH FORD SINK, COMMISSIONER; KENNETH THAXTON, JR., COMMISSIONER; and BURTON FORD, COMMISSIONER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On January 26, 1996, the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the decision of the Eastern District of Arkansas District Court. That opinion was not recommended for publication.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit and its judgment of January 26, 1996. That judgment affirmed the lower court's finding, following a bench trial, that while Ballard, petitioner, had established a prima facie case of (age) discrimination, respondents had advanced unrebutted legitimate, non-discriminatory reasons for petitioner's termination, and dismissed plaintiff's action. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

29 U.S.C. § 621 (ADEA), as amended by 42 U.S.C. § 6101 provides:

> Employment discrimination against workers aged forty and older is forbidden. It provides, *inter alia*, that it is unlawful for an employer to discharge any protected individual 'because of such individual's age.' 29 U.S.C. § 623(a)(1).

STATEMENT OF THE CASE

The Airport Commission of the City of Newport, Arkansas hired the petitioner, Joe Ballard, in April of 1981 for the position of airport manager. Petitioner was sixty-one years of age.

Ballard's duties were to open the office in the morning, close the office at night, fuel planes and keep the grounds up.

Joe Ballard testified that cutting the grass was a voluntary thing on his part, that he did it after hours, and did not charge the Airport Commission for doing it. He further stated that cutting the grass was not part of his actual job description as he understood it.

There were no duties specifically written down.

Petitioner's claim of age discrimination is based on his discharge by the Commission in 1992. At the time of his discharge, Ballard had not had any significant health problems in the past five years and held a valid pilot's license.

Respondents agreed Ballard's health was not a problem.

Petitioner was replaced with a man, Dorsey Block, age 50 at the time, who had medical problems which included recent bypass heart surgery.

The Commission doubled Dorsey Block's salary ($615.00 every two weeks) from that of Joe Ballard's salary ($320.00 every two weeks).

The Commission also hired four employees to help Dorsey Block with the job that Joe Ballard, petitioner, did alone.

Dorsey Block testified, "You've just got to do what's got to be done. You've got to have extra help at times.

Each of the four people worked forty (40) hours per week, weather permitting.

Burton Ford, one of the Commission members, testified that he had heard Commission members complain about the image Joe Ballard created (for the airport) and they were not happy with it.

Burton Ford testified that he was referring to personal image and that age is part of everyone's image.

Burton Ford agreed that it was obvious that Dorsey Block was fifteen (15) or twenty (20) years younger than Joe Ballard.

The City of Newport, Arkansas, stated in their response to the EEOC charge that "if Ballard had been a young man, he would have been discharged several years ago."

Burton Ford testified that although he had been on the Commission since 1978 and was familiar with the work that Mr. Ballard, petitioner, was doing, he never took Mr. Ballard aside and said "Joe, there's something that needs to be done a little bit different."

Ford testified that if there were some problems with Ballard, with the way he was doing things, he certainly didn't get any directions in an effort to try to change the way he was doing things.

Ford testified that Ballard did the best he could to enforce Commission rules that were "legally incorrect."

Ford testified that Danny Howard, a Commissioner at the time of the trial, did not want to follow the Commission rules enforced by Ballard.

Ford further testified, "We (the Commission) set rules and Mr. Howard then refused to abide by those rules."

Ford testified that for Ballard to have the tractor repaired "I would think that he would want to check with the Commission chairman concerning any repairs or problems."

Burton Ford admitted that it's hard to be a good public relations man and try to enforce rules that people don't want to live by at the same time.

Wiley Allbright, chairman of the Airport Commission, testified that he did not know if Ballard was ever told that part of his job description was to keep the grounds up and that, as far as he knew, Joe Ballard's duties were never written down.

Allbright further testified that he had been on the Commission for sixteen (16) or seventeen (17) years, that he was president of the Commission for ten (10) years, that if a complaint had been made against Joe Ballard, he would have known about it, and that, to his knowledge, no one ever complained about Joe Ballard at a Commission meeting.

Allbright testified that the first complaint he received about Joe Ballard, outside a Commission meeting, concerned Mr. Ballard taking a shirttail down off the wall and putting it on the bulletin board. The shirttail represented Mrs. Danny Howard's first solo flight. Allbright testified that the shirttail incident "really caused a big confusion among the Howard's (Mr. and Mrs.

Danny Howard)." Allbright testified that Danny Howard was one of the main people making complaints against Ballard and that, at the time he gave his discovery deposition, he could not remember anybody other than Danny Howard complaining about Ballard.

Allbright testified that Mr. Howard did not abide by the rules very well that Joe Ballard had been given responsibility of enforcing. The rules concerned refueling of Howard's airplane, the supply of his own fuel rather than purchasing it from the Commission, and parking of the plane and fuel truck.

Allbright testified that Ballard was told to enforce these rules for a period of two years.

Allbright testified that, now, Howard parks anywhere he wants to.

Allbright testified that besides clutch problems (with the tractor), the rain kept Ballard from getting in and cutting the grass, and that he never told Joe that, "The grass is too tall, you need to cut it."

Allbright further testified that it may be obvious that Dorsey Block was fifteen (15) to twenty (20) years younger than Ballard.

Allbright testified that at the time the Commission asked Mr. Ballard to resign, they were "satisfied" (with him) and that the airport always passed its inspections and that was due primarily to Ballard's efforts.

Allbright testified that the names of the Commission members that voted to terminate Ballard, besides himself, were Burton Ford, Terry Dillon, Kenny Thaxton, and Ralph Ford Sink.

Wayne Beard, Jr. testified that he was the mayor for the City of Newport, Arkansas, in 1992 when petitioner Ballard was discharged and had been mayor for the past twelve (12) years at that time.

Beard testified that the Airport Commission was charged with the responsibility of maintaining and taking care of all the airport operations and, under state law, the Commission is allowed to hire managers in personnel as they see fit. Further, the Commission is appointed by the city government but are regulated by their own state statutes. The city council had to pass an ordinance creating an airport commission which basically gives some of their authority over to a commission so that they can operate the facility.

Beard testified that the mayor is considered a non-voting member of all commissions and boards.

Beard testified that Danny Howard's problem was that he had to deal with Mr. Ballard concerning the purchase of fuel and that Mr. Ballard "in all honesty or sincerity, was just trying to follow, trying to pursue the policies of the Commission, and that as far as he knew, Ballard was doing an adequate job at the time he was terminated."

The Commission alleged complaints which

originated from the agricultural operators (crop dusters) operating out of the airport. The ag operators were complaining because of Ballard's enforcement of Commission rules concerning where they were to wash their planes and empty their tanks which had contained farm chemicals.

Wiley Allbright, chairman of the Commission, testified that, "If you've got ag planes on the airport, you're going to have a problem with them day in and day out. That's just a way of life with ag people. Mr. Ballard had the duty of dealing with the dirty work of the Commission to enforce these rules."

Danny Howard testified that he became upset because Joe Ballard would not sell him fuel at a discount and, that as a result, he started pumping his own fuel.

Danny Howard further testified that, for almost two years, he ignored the Commission rules that Joe Ballard was trying to enforce.

Petitioner filed a complaint in the United States District Court for the Eastern District of Arkansas, alleging violation of 29 U.S.C. § 621 (ADEA), as amended by 42 U.S.C. § 6101.

The matter was tried in the lower court without a jury. The lower court found that the petitioner had made a prima facie case but, on the whole, found that the petitioner had failed to sustain his burden of proof, and entered judgment for the respondents.

The Court of Appeals affirmed the

holding of the lower court on January 26, 1996 in an unpublished opinion.

Petitioner now seeks the review of this Court.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE LOWER COURT CLEARLY ERRED, FOLLOWING A BENCH TRIAL, THE COURT FOUND THAT WHILE PETITIONER HAD ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION, THE RESPONDENTS HAD ADVANCED UNREBUTTED LEGITIMATE NON-DISCRIMINATORY REASONS FOR PETITIONER'S TEMMINATION.

Once all the evidence had been received, the court proceeded to decide the case under the principles of a pretext case.

The court stated its findings in part as follows:

> "I think that the plaintiff has established - And I will deny the defendant's motion for a directed verdict because I think he is in the protected age group, which is anyone over forty, and he was replaced by a younger man. Even though he has made a prima facia case, I think that the Airport Commission has advanced legitimate, non-discriminatory reasons for the discharge. There are a number of them: That the housekeeping at the airport was not as it should have been; that the equipment was not being

properly maintained; that the grass was not being mowed on time; that logs and documentation of the activities at the airport were not kept as directed by the Commission; that the pilots' lounge was not properly kept up and maintained in the manner it should have been for the convenience of visiting pilots who had brought people into Newport. One of the principal reasons advanced by the Commission was that the plaintiff's public relations was not what they wanted. Regardless of whether they were reasonable in what they desired and wanted, the truth of the matter is that he did not fulfill their requirements of what they wanted as far as his public relations were concerned."

"These reasons that they have advanced, it seems to the Court, are legitimate, non-discriminatory reasons for discharging him."

"Then, the Court has to analyze whether, on the whole case, he has sustained his burden of proof, and I do not think he has. There has been a great deal of proof submitted by the defendant with reference to each of these reasons for the discharge, on the other hand."

"I think the plaintiff has

made an honest witness. I think he has leaned over backwards to state it like it is."

"Anyway, on the whole case I think you have to fairly say that the plaintiff has simply not sustained his burden of proof of showing age discrimination on his whole case.

"So, in accordance with these findings of fact and conclusions of law dictated from the bench, judgment will be entered for the defendants and the complaint will be denied and dismissed."

Whether the case is a pretext case or a mixed-motive case is a question for the court once all the evidence has been received:

> "...if the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*..." Id. (quoting *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J. concurring)). *Radabaugh v. Zip Feed Mills*, 977 F.2d 444, 62 F.E.P. 438 (8th Cir. 1993)

The court was clearly erroneous, based on the evidence, when it decided the case on "pretext." The court compounded its error by failing to then consider the case in light of mixed-motive principles.

As the court itself explained in *Waters v. Furnco Construction Corp.*, 438 U.S. 567 (1978), however, people in a business context normally do not act in an arbitrary manner, and when all legitimate reasons for the employer's actions have been eliminated, it is more likely than not that the employer based its decision on an impermissible consideration.

The allocation of the burden of proof in ADEA cases is the same as in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17 (1988), *Beshears v. Asbill*, 930 F.2d 1348, 1353 nn.6 & 7 [55 FEP Cases 1383](8th Cir. 1991), and thus depends on whether a case is characterized as a "pretext" case or as a "mixed-motives" case.

The controlling case is *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). While *Hicks* ended the strict "pretext-only" approach in the Eighth Circuit, among others, it also rejected a "pretext-plus" approach adopted in the First Circuit, requiring not only a showing of pretext but also some direct evidence of discrimination; see, e.g., *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990).

Thus, *Hicks* makes clear that while a plaintiff is not entitled to judgment as a matter of law simply on her prima facie case and a showing of pretext, nonetheless a fact finder could infer discrimination from this proof alone:

> The fact finder's disbelief of the reasons put forward by the

> defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "no additional proof of discrimination is required," 970 F.2d, 493 (emphasis added).

In a recent Eighth Circuit case, *Gaworski v. ITT Commercial Finance Corp.*, 64 F.E.P. 382 (8th Cir. 1994), the court applied principles announced in *Hicks* in which the majority (Judges Lay and Richard Arnold) held that it was without power to reverse a jury's finding of age discrimination based on sufficient evidence of a prima facie case and pretextual reasons by the employer. The "ultimate question" of discrimination was for the jury and no additional proof of discrimination is required; the jury could infer discrimination from the prima facie case and the pretextual reasons.

The case at bar is distinguished from *Hicks* as the court, in a bench trial, held that petitioner had established a prima facie case, the court then ruled for the defendant. Petitioner contends that this was clearly erroneous for the reasons and principles announced in another Eighth Circuit case, *Radabaugh v. Zip Feed Mills*,

977 F.2d 444, 62 F.E.P. 438 (8th Cir. 1993), and *Hutson v. McDonnell Douglas Corp.* 63 F.3d 771 (8th Cir. 1995).

The Court of Appeals for the Eighth Circuit incorrectly interpreted the decisions in *Radabaugh* and *Hutson* pursuant to the facts in this case.

The court in *Radabaugh* stated,

"Whether the case is a pretext case or a mixed-motive case is a question for the court once all the evidence has been received:

> ...if the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*..." Id. (quoting *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J. concurring))

The court was clearly erroneous, based on the evidence, when it decided the case on "pretext" principles. The court then compounded its error by failing to then consider the case in light of mixed-motive principles announced in *Radabaugh*.

The premise of a pretext case is that either a legitimate or an illegitimate set of considerations led to the challenged decision. *Price Waterhouse*, 490 U.S. at 247.

By contrast, a mixed-motives case arises when an employment decision was the product of a mixture of legitimate and illegitimate motives. *Price Waterhouse, supra*.

Hutson v. McDonnell Douglas Corp., 63 F.3rd 771 (8th Cir. 1995), concerns a reduction in force discharge as opposed to the case at bar, where petitioner Ballard was discharged and replaced with a younger man. In the case at bar, the trial court held that petitioner Ballard established a prima facie case. In the case at bar, respondent, Airport Commission, was not down-sizing; to the contra, the respondent, Commission, hired two new full time employees to help petitioner Ballard's replacement.

Ballard has shown more than mere stray remarks or attitude concerning his age. One Commission member testified that the Commission was dissatisfied with the image Ballard created (for the Commission), and age is a part of one's image.

Ballard has shown the required discriminatory component of adverse employment decision as required by *Price Waterhouse's* mixed motives analysis. The failure of the lower courts to apply the *Price Waterhouse's* mixed-motive analysis was clearly erroneous.

In *O'Connor v. Consolidated Coin Caterers Corp.*, No. 95-354, decided April 1, 1996, this Court stated:

> "If the trier of fact finds that the elements of the prima facie

> case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff. *St. Mary's Honor Center, supra,* at 509-510, and n. 3; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)."

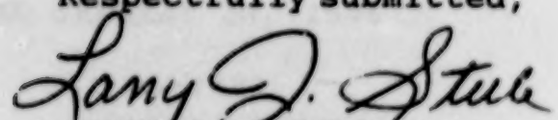
The complaints made by the employer for Ballard's discharge must be viewed as a two-edged sword. The complaints described by the employer are only more evidence of the harassment Ballard was compelled to bear, and evidence of his employer's further discrimination toward him. Ballard was forced to endure the complaints of the present board member, Danny Howard, and the complaints of agri pilots solely because he attempted to enforce Commission rules which were later withdrawn. The complaint about not mowing the grass is solely unfounded.

CONCLUSION

Based on the facts and the law, the lower courts' failure to consider this case under mixed motive principles, after finding petitioner had made a prima facie case for age discrimination, is clearly erroneous.

Petitioner submits that this Honorable Court should reverse the decisions of the lower courts.

Respectfully submitted,



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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 26, 1996

No. 95-2581

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOE BALLARD,

Plaintiff-Appellant,

v.

WILEY ALBRIGHT, CHAIRMAN, et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Arkansas

Submitted January 23, 1996
Filed January 23, 1996

Before: McMILLIAN, WOLLMAN and MURPHY, Circuit Judges.

PER CURIAM.

Joe Ballard appeals from the final judgment entered in the district court[1] dismissing his action under the Age Discrimination in Employment Act, 29 U.S.C. § 623. We affirm.

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[1]The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

APPENDIX B - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2581

JOE BALLARD,

Plaintiff-Appellant,

v.

WILEY ALBRIGHT, CHAIRMAN, et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Arkansas

Submitted January 23, 1996
Filed January 23, 1996

Following a bench trial, the district court found that, while Ballard had established a prima facie case of discrimination, defendants had advanced unrebutted legitimate, non-discriminatory reasons for Ballard's termination, namely, Ballard's failure adequately to perform his job as airport manager. We review the district court's findings for clear error. See Fed. R. Civ. P. 52(a); Tuttle v. Henry J. Kaiser Co., 921 F.2d 183, 186 (8th Cir. 1990). After clearly reviewing the record on appeal and the parties' briefs, we conclude the district court did not clearly err in its determination, and thus properly entered

judgment for defendants. See Richmond v. Board of Regents of Univ. of Minn., 957 F.2d 595, 598 (8th Cir. 1992) (poor job performance is valid, non-discriminatory reason for termination). We reject Ballard's argument that the district court erred in failing to apply a "mixed-motives" analysis to his case, because Ballard did not present enough evidence of a discriminatory component to meet the threshold showing required for such an analysis. See Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 780 (8th Cir. 1995); Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 448 (8th Cir. 1993).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C - JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, LITTLE ROCK DIVISION

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

Case No.: LR-C-94-154

JOE BALLARD,

Plaintiff,

v.

WILEY ALBRIGHT, et al.

Defendants.

JUDGMENT

DECISION BY THE COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's oral findings of fact and conclusions of law rendered from the bench this date at the conclusion of the trial in this matter, judgment is entered in favor of all defendants and against plaintiff Joe Ballard and that plaintiff take nothing, that the action be dismissed with prejudice and all relief prayed for is denied.

s/ Henry Woods

HENRY WOODS,
U.S. DISTRICT JUDGE

DATED: May 22, 1995